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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID MATTHEW KENNY, Defendant and Appellant.	H040515 (Santa Clara County Super. Ct. No. 181876)

Defendant David Matthew Kenny appeals the denial of a petition to recall his sentence under Penal Code section 1170.126[1] (the Three Strikes Reform Act of 2012, also known as Proposition 36), arguing that the trial court erred by failing to impose a burden of proof on the prosecution or decide the relevant dangerousness inquiry under any standard of proof, and by deciding the dangerousness question without applying a presumption favoring resentencing. He also argues that the trial court's dangerousness determination was an abuse of discretion because it was unsupported by substantial evidence, that he was entitled to a jury trial on the dangerousness question, and that the definition of dangerousness contained in the 2014 Safe Neighborhoods and Schools Act (also known as Proposition 47) applies to the section 1170.126 dangerousness inquiry. For the reasons stated here, we will affirm.

[1] Unspecified statutory references are to the Penal Code. Unspecified subdivisions refer to section 1170.126.

I. BACKGROUND

Defendant, who is serving a 25-years-to-life sentence for a 1996 possession of stolen property conviction (§ 496) with two prior strike convictions for burglary of an inhabited dwelling (§ 459), filed a petition to recall his sentence under section 1170.126, part of the Three Strikes Reform Act of 2012 (the Reform Act).[2] The trial court found that defendant satisfied the criteria for eligibility (§ 667, subd. (e)), and appointed counsel.

A. THE PROSECUTION'S POSITION

The prosecution subpoenaed from the California Department of Corrections and Rehabilitation (CDCR) over 250 pages of records pertaining to defendant. Relying on those records, as well as probation reports from 1976 and 1996, the prosecution opposed the petition under subdivision (f), asserting that resentencing defendant would pose an unreasonable risk of danger to public safety based on defendant's criminal history and his conduct while incarcerated.

Defendant's criminal history included 1976 convictions for assault with a deadly weapon and residential burglary. According to the 1976 probation report, defendant (then 20 years old) and a co-defendant burglarized three homes in less than 24 hours. Two days later, they were confronted by a man for bothering his 14-year-old sister-in-law at a bus station. As the man returned to his car, defendant shot him in the head and thigh,

[2] The Reform Act amended sections 667 and 1170.12 and added section 1170.126. Section 1170.126 authorizes persons serving a third-strike indeterminate life sentence (§ 667, subd. (e)(2)) for a nonserious or nonviolent conviction to file "a petition for a recall of sentence" (§ 1170.126, subd. (b)). A prisoner qualifies for resentencing as a second-strike offender by meeting certain eligibility requirements related to the nature of the prior convictions. (*Id.*, subd. (e).) Subdivision (f) directs the trial court to resentence a prisoner who meets the subdivision (e) requirements "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Subdivision (g) directs the court's discretion to the prisoner's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and any other evidence that the court deems relevant to the dangerousness inquiry.

and the co-defendant shot him in the chest. Defendant served additional prison terms for burglary convictions in 1983, 1986, and 1990.

In 1995, at age 38, defendant was charged with residential burglary and possession of stolen property. According to his statement in the 1996 probation report, defendant knew the victim and denied breaking into her home. He claimed the victim had given him jewelry because she and her ex-husband (whom defendant had met in prison) had sold him a car for $800 with an altered Vehicle Identification Number. A jury found defendant not guilty of burglary but guilty of possessing stolen property, which by definition includes property obtained through extortion (§ 496). The victim valued the stolen jewelry, some of which was recovered from a pawn shop, at $8,526. She reported feeling threatened and violated by defendant's actions. The probation department reported that police were unable to recover the vehicle in question. Defendant told police he parked it by a liquor store, but the liquor store clerk told police that defendant had moved the car. The victim's ex-husband also denied selling the car to defendant. He said he loaned the car to defendant, and he thought defendant sold the car.

According to the documents subpoenaed from the CDCR by the prosecution, defendant had numerous disciplinary violations while in custody. He violated prison rules by manufacturing alcohol several times between 1998 and 2007. In 2005 defendant disobeyed orders to stay away from the phones, and in 1997 he disobeyed lock-up orders and orders to " 'get down' " when an alarm sounded. In 2011, defendant was classified as a victim of a battery at Folsom Prison and deemed a " 'threat to the safety and security of the institution.' "

In 2009, defendant was observed preparing morphine in his cell and refused an officer's orders to " 'get down.' " In May 2007, defendant was verbally abusive to medical staff when seeking treatment for shoulder pain, and he threw a scale into the medical clinic after being asked to leave.

In May 2012 defendant refused a bed move, attempted to manipulate staff by refusing medication that did not contain narcotics, and attempted to manipulate medical and custody staff by complaining of chest pains and refusing treatment unless he received his choice of pain medication. A few days later he again feigned a medical emergency by calling "man down," and then rejected medical treatment by a registered nurse, stating, " 'I don't want any treatment from her. I want a fucken [*sic*] Doctor right now! If you don't give me what I want, you're all going to pay!' " He stated that he would do whatever was necessary to obtain his pain medication. In June 2012, a prison doctor reported that defendant was threatening him with a complaint to the medical board in order to obtain a narcotics prescription.

B. DEFENDANT'S POSITION

Defendant filed a reply to the prosecution's opposition, arguing that the prosecution had not met its burden to show that resentencing would pose an unreasonable risk of danger to public safety. Defendant argued that his only violent conviction occurred in 1976 when he was just entering adulthood, and the rules violations were "almost without exception non-violent incidents involving the possession of alcohol and disputes over his medical care." Defendant argued that the risk to public safety posed by his release was low based on a progress report finding that " 'the recidivism rate of inmates released under Proposition 36 is far below state and national averages,' " and that " '[l]ess than 2 percent of the inmates released [as of August 2013] under Proposition 36 have been charged with a new crime.' " In a separate filing, defendant moved for a jury trial on the dangerousness question. That motion was denied.

C. THE DANGEROUSNESS HEARING

An evidentiary hearing was held in December 2013. Defendant testified that he was currently housed at the Richard J. Donovan Correctional Facility in San Diego, in open yard protective custody. He was moved from Folsom after he was jumped for interfering with an inmate effort to beat up another inmate, disputing that the targeted

inmate was a child molester. Defendant testified that he had manufactured alcohol in prison to support himself because he had not wanted to ask family members for money. He manufactured alcohol at Solano, and continued at San Quentin where his custody level was increased because of the infractions. He stopped manufacturing alcohol after he was transferred to Folsom and written up. He explained that he injured his shoulder and had a heart attack at San Quentin, and Folsom was a miserable place. He did not want to break the law anymore, and he decided to stay away from anyone who would be trouble. That meant stopping alcohol manufacturing because only the inmate drug dealers could afford to buy it.

Defendant admitted he had a bad habit of getting out of prison and committing burglaries because he had been homeless, unable to get a job, needed to get on his feet, and wasn't thinking about what he was doing. But his perspective had changed; he now thinks "what if it was my house?" or the house of someone he knew.

Defendant testified that over the past six or seven years he tried to not do things that were grossly stupid. He attributed his recent rules violations to medical issues. Regarding the 2007 confrontation with medical staff, defendant testified that he went to the sick call office with shoulder pain, where he argued with staff. His pain medication was ineffective, he had been getting minimal sleep for 10 days, and he had recently been told by a specialist that his shoulder could not be fixed. He did not acknowledge throwing the scale into the clinic after being asked to leave. Rather, he said that he "kind of dropped it in," and that he "was trying to hand it to the nurse at the door and somebody was in the way," and "[i]t started in the outside" and "ended up in the inside." According to defendant, the violation was reduced to "something that was kind of being an idiot[.]"

Defendant testified that he was treated with morphine for his pain. His 2009 violation involved cooking his extended release morphine pills for stronger immediate pain relief. In May 2012, he argued with a prison nurse when his prescription was cancelled after he was transferred to Jamestown. He said the confrontation was stupid

and he could have handled it better, but he "just felt like they were wrong and I wasn't." Since that incident he told prison staff that he no longer wanted narcotics, and he now takes ibuprofen for the pain.

Defendant explained that he had been stupid and wasted his life. If released he would have temporary housing, he would have his injuries evaluated for disability, and if he were able to work he would seek retraining. He denied committing burglary in 1996, maintaining that the victim gave him her jewelry.

D. THE TRIAL COURT'S RULING

In denying the petition, the trial court described defendant's conduct in 1976 as outrageous, commenting that defendant "received the break of breaks" because he was allowed to plea bargain attempted murder and assault with intent to commit murder, both carrying life sentences, to aggravated assault. The court noted the absence of any crime-free period in defendant's life. Defendant went to prison four times and violated his parole upon release each time. The court observed that the probation officer and the judge who sentenced him in 1996 considered him a sociopath, and it found his account that the victim gave him her heirloom jewelry to be "preposterous." The court commented that defendant's claim that he had purchased a stolen vehicle that he could not sell proved not to be true, and that the only reason defendant qualified for a resentencing hearing under the Reform Act was because he was given another break in 1996 when the jury returned a "compromised" verdict instead of finding him guilty of first degree burglary, which would have rendered him ineligible for resentencing under the Reform Act. (§§ 1170.126, subd. (e)(1), 1192.7, subd. (c).)

Regarding his conduct in prison, the court observed that defendant lacked impulse control, particularly in his treatment of medical staff and his decision to become a prison bootlegger to make money, which resulted in continuous rules violations. The court concluded: "[Your] extensive history of prior criminality, your constant infractions in prison, albeit, not involving violent conduct, but involving prison rules, leaves me to

believe that your impulse control is such that if you were released today in this community and things weren't going how you felt they should go, that I really feel that you are the type of person who would act out. [¶] And that acting out in my judgment could be an unreasonable risk to the safety of this community. So for all of those reasons … I'm going to have to deny your petition for resentencing."

II. DISCUSSION

A. BURDEN AND STANDARD OF PROOF

Defendant argues that the trial court failed to impose upon the prosecution any burden or standard of proof to establish dangerousness, violating his due process rights, and that the court abused its discretion by failing to identify any evidentiary standard in its determination of dangerousness. "Burden of proof" is defined as "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of … the court." (Evid. Code, § 115.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief … ." (Evid. Code, § 500.) The burden of establishing dangerousness in Reform Act hearings rests with the prosecution. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305 (*Kaulick*).)

The prosecution acknowledged that it bore the burden of proof in its written opposition, it subpoenaed defendant's prison records which were filed with the court, and its opposition was supported with specific documents from defendant's prison file and probation reports. At the evidentiary hearing, the court addressed the burden of proof as follows: "[T]he decision as to whether or not [defendant] should be resentenced depends on an exercise of the Court's discretion as to whether or not from all the facts and circumstances and taking into account the criteria of the statute whether or not he would be [an] unreasonable risk to the community. [¶] I believe the People have the burden of proof to prove the fact that they were relying upon specific facts to urge that the petition

should not be granted. If that fact is contested, I think the People would have the burden of proof to prove that by preponderance of the evidence. But the question as to whether or not he poses an unreasonable risk of danger to the community is a decision left to the Court. And the Court has to exercise [its] discretion based on all the facts and circumstances taken into account."

Contrary to defendant's view, the court did not make its dangerousness determination "unbounded by a burden of proof or evidentiary standard." The court expressly placed the burden on the prosecution to produce evidence to support any dangerousness determination. The prosecution met that burden by producing defendant's prison records—records that defendant did not dispute. Although the court recognized that the dangerousness question was ultimately left to its discretion, it is clear from the record that the court understood that its decision needed to be supported by facts shown to be true by a preponderance of the evidence. We find no error in the court's application of the burden or standard of proof.

B. SCOPE OF THE TRIAL COURT'S DISCRETION

Defendant argues that the trial court erred by denying his resentencing petition without applying a statutorily mandated presumption favoring resentencing. In defendant's view, the shall/unless language in section 1170.126, subdivision (f) ("the petitioner *shall* be resentenced … *unless* the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety") creates a presumption favoring resentencing.

Defendant refers us to shall/unless language in former section 3041[3] and argues that the language creates a presumption in favor of parole, citing *In re Rosenkrantz*

[3] Former section 3041, subdivision (b) states that the parole board "shall set a release date [for the inmate] unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of

(2002) 29 Cal.4th 616, 654. The *In re Rosenkrantz* court observed that "the governing statute provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration … ," and concluded that "parole applicants … have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*Ibid*.) The *In re Rosenkrantz* court never discussed, much less recognized, a presumption established by the shall/unless language used in former section 3041, subdivision (b).

In our view, the inclusion of the words "shall" and "unless" in subdivision (f) does not create a presumption favoring a second strike sentence; the syntax merely reinforces that a trial court is vested with discretion to determine whether a defendant poses an unreasonable risk of danger based on the totality of the circumstances presented in a particular case. We reject defendant's argument that resentencing under the Reform Act is the converse of a *Romero* determination, and defendant's contention that the Reform Act evinces a preference for resentencing to a second-strike term. We further reject defendant's argument that the trial court should have considered the fiscal ramifications of his continued incarceration in the dangerousness calculation. Although saving money was a stated goal of the Reform Act, the primary purpose of both the Three Strikes law and the Reform Act is to protect public safety. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1036–1037.) The electorate already conducted a cost-benefit analysis by determining that those inmates whose resentencing would pose an unreasonable risk of danger to public safety should not be released.

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incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (§ 3041, subd. (b); Stats. 1896, ch. 1446, § 3, p. 5171.)

C. THE TRIAL COURT'S EXERCISE OF DISCRETION

Defendant argues that the denial of his resentencing petition was an abuse of discretion because substantial evidence does not support the trial court's dangerousness determination. "A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

Here the factual finding critical to the trial court's decision was that defendant lacked impulse control. That finding was supported not only by defendant's criminal history but by his more recent prison record—his numerous infractions including his defiance of prison rules and his threatening outbursts toward prison staff.

Defendant presses that his age, maturity, new insight including empathy for property crime victims, and his more recent discipline-free prison conduct demonstrate impulse control. But defendant's testimony and the absence of any reported disciplinary issues during the 18 months preceding the evidentiary hearing (including the 12 months while his resentencing petition was pending) do not negate the evidence supporting the trial court's finding. In light of the entire record, the court did not abuse its discretion in concluding that defendant's lack of impulse control constituted a risk of dangerousness to public safety should he be resentenced.

D. THE RIGHT TO A JURY TRIAL DOES NOT ATTACH TO THE SUBDIVISION (F) DANGEROUSNESS INQUIRY

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), defendant argues that he has a due process right to have a jury decide beyond a reasonable doubt whether resentencing would endanger public safety under subdivision (f). In *Apprendi*, the United States Supreme Court held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490.) Applying *Apprendi*

to California's determinate sentencing law, the court held in *Cunningham* that, by placing sentencing-elevating factfinding within the judge's purview, the law violated a defendant's right to trial by jury. (*Cunningham*, at p. 288.) Defendant argues here that use of the word "shall" in subdivision (f) establishes a presumption that a two-strike sentence is "the usual punishment" akin to the prescribed statutory maximum sentence in *Apprendi*, making unreasonable risk of danger to public safety a sentencing-enhancing factor that must be proven to a jury.

Defendant's argument was rejected in *Kaulick*, *supra*, 215 Cal.App.4th 1279. *Kaulick* addressed the standard of proof applicable to the subdivision (f) dangerousness inquiry. The *Kaulick* court rejected the argument that beyond a reasonable doubt was the applicable standard, concluding that a finding of dangerousness is not a "factor which justifies enhancing a defendant's sentence beyond a *statutorily presumed second strike sentence*." (*Id*. at p. 1301, italics added.) Like defendant here, the defendant in *Kaulick* argued that once he was eligible for resentencing under subdivision (e), he "was subject *only* to a second strike sentence, *unless* the prosecution established dangerousness." (*Kaulick*, at p. 1302.) The court disagreed and concluded that a third-strike indeterminate sentence was *not* recalled under subdivision (f) by virtue of meeting subdivision (e)'s eligibility requirements. (*Kaulick*, at p. 1303.) *Kaulick* examined the language and structure of subdivision (f)—" 'shall be resentenced' to a second-strike sentence 'unless the court … determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety' "—to conclude that dangerousness under subdivision (f) is a threshold hurdle to be surmounted *before* a prisoner can be resentenced. (*Kaulick*, at pp. 1302–1303.) Contrary to defendant's argument, by using the word "shall," the electorate did not enact a presumption favoring a second-strike sentence making the dangerousness inquiry a sentence-enhancing factor. (*Id.* at p. 1299, fn. 23.)

Kaulick also looked to *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*), in which a defendant's Sixth Amendment right to have essential facts found by a jury

beyond a reasonable doubt did not apply to downward sentence modifications prompted by intervening law. Under federal law, the United States Sentencing Commission is charged with promulgating sentencing guidelines and issuing policy statements regarding those guidelines. When the Commission reduces a sentencing range for a given offense, it must determine "in what circumstances and by what amount the sentences … for the offense may be reduced." (28 U.S.C. § 994(u).) A district court may reduce an otherwise final sentence only if the reduction is consistent with applicable policy (18 U.S.C. § 3582(c)), and the policy statement at issue in *Dillon* foreclosed a court from reducing a sentence below the minimum amended guideline range. (*Dillon*, at pp. 821–822.)

The prisoner in *Dillon* equated a sentencing modification under 18 U.S.C. § 3582(c) to the type of sentencing scheme struck under *Apprendi*, implicating the Sixth Amendment right to a jury trial unless the policy statement were deemed discretionary. Disagreeing, the Supreme Court viewed section 3582(c) not as a sentencing or resentencing proceeding, but rather as a " 'modif[ication of] a term of imprisonment,' by giving courts the power to 'reduce' an otherwise final sentence in circumstances specified by the Commission." (*Dillon, supra*, 560 U.S. at p. 825.) In other words, Congress had "authorize[d] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." (*Id*. at p. 826.) *Dillon* observed that the sentencing modification proceedings were not constitutionally compelled, nor was retroactivity constitutionally mandated. To the contrary, the statute "represent[ed] a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the [amended] Guidelines." (*Id*. at p. 828.)

Kaulick applied the reasoning in *Dillon* to resentencing applications under section 1170.126. Retroactive application of the Reform Act to inmates serving third-strike sentences is not constitutionally mandated. Resentencing under section 1170.126 is an act of lenity by the electorate, and the eligibility factors for that resentencing,

including the dangerousness determination, are not encompassed by the Sixth Amendment. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1304–1305.)

We embrace *Kaulick*'s reasoning and apply it here. We conclude that unreasonable risk of danger to public safety is not a sentence-enhancing factor triggering the constitutional right to a jury trial.

E. PROPOSITION 47 DOES NOT IMPACT SUBDIVISION (F)

In November 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. Proposition 47 reclassified certain felony drug and theft related offenses as misdemeanors and created a new resentencing provision—section 1170.18—for persons serving felony sentences for the reclassified offenses. (§ 1170.18, subd. (a).) Similar to section 1170.126, newly-enacted section 1170.18 requires the trial court to determine whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) But unlike section 1170.126, section 1170.18 provides a restrictive definition of "unreasonable risk of danger to public safety." Section 1170.18, subdivision (c) reads: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."[4]

[4] Section 667, subdivision (e)(2)(C)(iv) lists eight felonies or classes of felonies: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as

Defendant argues that section 1170.18, subdivision (c)'s introductory phrase—"As used throughout this Code"—by its plain language incorporates that subdivision's definition of "unreasonable risk of danger to public safety" (the eight categories of felonies listed in footnote 4) into section 1170.126 proceedings and that a remand is warranted for the trial court to revisit its dangerousness inquiry in light of the newer definition. According to defendant, Proposition 47's dangerousness definition "serves to elucidate the meaning of the same phrase used in the [Reform Act], making it applicable to the [Reform Act]." In defendant's view, both propositions have the same overall purposes—to reduce incarceration by reserving imprisonment for truly dangerous offenders and to redirect the resulting savings to public safety measures—so they should share the same dangerousness definition. The People counter that Proposition 47's definition of "unreasonable risk of danger to public safety" applies only to persons seeking a recall of their sentence under that initiative, and, even if the definition were to apply to Reform Act resentencing petitions, Proposition 47's definition of "unreasonable risk of danger to public safety" would not apply retroactively to defendant.[5]

In our view, the drafters of Proposition 47, and the electorate who approved it, did not intend that initiative to rework the procedures established by the electorate only two years earlier to revisit certain Three Strikes sentences. The Legislative Analyst wrote in the Voter Information Guide that Proposition 47 was intended to reduce penalties for "certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors," and identified those crimes as "Grand Theft," "Shoplifting,"

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defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

[5] The California Supreme Court has granted review in two cases addressing these arguments. *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825, held that Proposition 47's "unreasonable risk of danger to public safety" definition does not apply to the Reform Act, and *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676, held that the definition does not apply retroactively to Reform Act resentencing petitions.

"Receiving Stolen Property," "Writing Bad Checks," "Check Forgery," and "Drug Possession." (Voter Information Guide, Gen. Elect. (Nov. 4, 2014) analysis by the Legislative Analyst, pp. 35–36.) Indeed, the analysis explained that the initiative "allows offenders currently serving felony sentences *for the above crimes* to apply to have their felony sentences reduced to misdemeanor sentences," and that "a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime." (*Id*. at p. 36, italics added.) The proponents of Proposition 47 similarly argued the initiative "[s]tops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crime by changing low-level, nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors." (*Id*. at p. 38, argument in favor of Proposition 47.) There is no mention whatsoever of the passage of the 2012 Reform Act, much less any change to that act, anywhere in the Voter Information Guide.

A literal application of Proposition 47's definition of "unreasonable risk of danger to public safety" would undermine the Reform Act's express directive to the trial court to consider "[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g)(3).) A literal application would limit the court's inquiry to whether a petitioning inmate could be deemed to pose a risk of committing one of the select offenses listed in section 677, subdivision (e)(2)(C)(iv). But risk of danger to public safety encompasses far more sweeping conduct than those enumerated offenses. Indeed, the trial court would be unable to consider an inmate's risk of committing other crimes that endanger the public safety, such as driving while intoxicated, arson, robbery, or burglary. Such a radical contradiction of the trial court's discretion to assess the risk of danger of resentencing a Three Strikes offender was not contemplated by the electorate in enacting Proposition 47.

We conclude that Proposition 47's definition of "unreasonable risk of danger to public safety" is limited to that initiative. A literal reading of Proposition 47 would result in consequences unintended by the drafters of the initiative or the voters. (*People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1033 ["The literal language of a statute does not prevail if it conflicts with the lawmakers' intent."].) The stated purpose of section 1170.18 and evidence of the electorate's intent in enacting it demonstrate that the voters did not intend to alter the Reform Act in any way, or to impact the resentencing of any person serving a sentence other than for the nonserious and nonviolent property and drug crimes listed in section 1170.18, subdivision (a).

In light of our conclusion, we do not reach defendant's retroactivity argument.

III. DISPOSITION

The order denying defendant's resentencing petition is affirmed.

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Grover, J.

I CONCUR:

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Premo, J.

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RUSHING, P.J., Dissenting

I respectfully dissent. I would hold that Kenny is entitled to retroactive application of Proposition 47's definition of dangerousness for the reasons set forth in *People v. Cordova* (2016) 248 Cal.App.4th 543, review granted August 31, 2016, S236179. Accordingly, I would reverse and remand with directions to the trial court to adjudicate Kenny's petition using the definition of "unreasonable risk of danger to public safety" under Penal Code section 1170.18, subdivision (c).

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RUSHING, P.J.

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